

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES E. SMAGALA, an  
individual, and LINDA M.  
FERRO, an individual,  
Co-Trustees of THE  
SMAGALA-FERRO 2001 FAMILY  
TRUST DATED MARCH 13, 2001,

3:12-CV-00860-BR

OPINION AND ORDER

Plaintiffs,

v.

SEQUOIA INSURANCE COMPANY, a  
California insurance business  
corporation, and AMERICAN  
FAMILY MUTUAL INSURANCE  
COMPANY, a Wisconsin  
insurance business  
corporation,

Defendants.

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**BROWN, Judge.**

This matter comes before the Court on Defendant Sequoia Insurance Company's Motion (#12) for Summary Judgment. For the reasons that follow, the Court **GRANTS** Defendant's Motion and **DISMISSES** Plaintiffs' claims against Sequoia.

#### **BACKGROUND**

The following facts are taken from the Joint Statement of Agreed Facts and the parties summary-judgment materials.

The Westbrook Apartments were built in the 1970s and are located in Beaverton, Oregon. Westbrook is comprised of four buildings containing 48 individual apartment units, a leasing office, storage, parking buildings, and common areas.

In 2007 and 2008 SKL Properties, LLC, and Premium Rental Properties LLC (PRP), acting as developers and general contractors, performed renovations and repairs at Westbrook to prepare the property for sale.

On May 29, 2008, Plaintiffs entered into a contract to purchase Westbrook on completion of the property improvements being undertaken by SKL and PRP.<sup>1</sup> While the improvements were being made, Plaintiffs entered into a lease with SKL for the property.

On August 26, 2008, Defendant Sequoia Insurance Company issued a Commercial Multi-Peril Insurance Policy to Plaintiff Smagala-Ferro 2001 Family Trust covering Westbrook effective August 15, 2008, through August 15, 2009.

In November or December 2008 SKL and PRP represented to Plaintiffs that the improvements and repairs to Westbrook were complete. At that time Plaintiffs terminated their lease with SKL and PRP and took possession of the property.

On July 27, 2009, Sequoia issued a Commercial Multi-Peril Insurance Policy to Smagala-Ferro 2001 Family Trust covering Westbrook effective August 15, 2009, through August 15, 2010.

In June 2011 Plaintiffs hired Western Architectural (WA) as

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<sup>1</sup> In their Complaint, Plaintiffs allege "Plaintiffs James E. Smagala and Linda M. Ferro, Co-Trustees of the Smagala-Ferro 2001 Family Trust dated March 13, 2001 (Smagala) are the current owners of Westbrook." Compl. at ¶ 4.

forensic architects and engineers to perform an invasive investigation of Westbrook to determine whether there were defects in the Westbrook buildings.

On July 1, 2011, WA issued an Invasive Building Envelope Assessment Report in which it described a number of issues with the buildings, construction, and repairs at Westbrook.

On September 26, 2011, Plaintiffs submitted a Notice of Claim/Proof of Loss to Sequoia in which they advised Sequoia in pertinent part:

There have been covered losses at the premises that have been discovered thus far, including coverage for property damage and collapse. Smagala hired Western Architectural to perform an invasive exterior envelope assessment of the Westbrook Apartments. The investigation performed by Western Architectural identified property damage and collapse conditions. Enclosed please find a copy of the Western Architectural report dated July 1, 2011.

To help resolve this claim, we ask that Sequoia Insurance Company:

1. Immediately investigate the claim with Westbrook Apartments' expert, Western Architectural, and share in the cost of the investigation (e.g., contractors for destructive investigation, scaffolding, equipment, etc); and
2. Work with Westbrook Apartments and its expert to determine covered and uncovered loss promptly.

Decl. of Lola Hogan, Ex. 1 at 1-2.

Sequoia hired West Coast Forensics, Engineering and Design, LLC, to investigate the alleged defects at Westbrook.

On November 2, 2011, Structural Engineer Jeffrey Lewis of West Coast performed an on-site investigation at Westbrook. Lewis testifies in his Declaration that although the WA report referenced "potential collapse conditions, . . . [the WA report] does not provide any documentation whatsoever of any collapse of any of the buildings at the Westbrook Apartments as of the date of the report." Decl. of Jeffrey Lewis at ¶ 3. During the investigation and inspection Lewis "looked for any evidence of collapse. None of the buildings had collapsed as of the date of [his] investigation. There was no evidence that any part of any of the buildings had abruptly fallen down or caved in." Lewis Decl. at ¶ 5. Lewis testifies "[a]t the time of this investigation, all of the units at the Westbrook Apartment complex were occupied with the exception of one or two units that were being cleaned and prepared for new tenants." *Id.* at ¶ 4.

On November 23, 2011, Plaintiffs filed an action in Washington County Circuit Court against SKL, PRP, and others alleging misrepresentation, breach of contract, and negligence related to the repairs, renovations, and sale of Westbrook. Specifically, Plaintiffs alleged, among other things, that the defects caused water intrusion and property damage that included causing "portions of the apartments to collapse and . . . imminent risk of additional movement and collapse of building components, all of which continue to threaten the integrity and

livability at the Westbrook apartments." Decl. of Ralph Spooner, Ex. 1 at ¶ 15.

On December 22, 2011, Sequoia issued a denial letter to Plaintiffs in which Vice President of Claims, Lola Hogan, noted Sequoia had reviewed Plaintiffs' Notice of Claim and WA's report, had retained its own consultant to inspect and to review the property, and had reviewed the "emergency repairs" performed at the property on December 12, 2011. Hogan also noted:

The Sequoia policies include various Additional Coverages, including the Additional Coverage of Collapse. The Sequoia policies define the term "collapse" and the additional coverage of collapse to mean as follows:

1. With respect to buildings:

a. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose;

b. A building or any part of a building that is in danger of falling down or caving is not considered to be in a state of collapse;

c. A part of a building that is standing is not considered to be in a state of collapse even if it is separated from another part of the building;

d. A building that is standing or any part of the building that is standing that is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending,

leaning, settling, shrinking or expansion.

The Western Architectural Report was issued on July 1, 2011. None of the units within any of the buildings have at this point been vacated because of a potential of collapse. The inspection of the property did not reveal any building or any part of any building that had been the subject of an abrupt falling down or falling in. None of the buildings had sustained a collapse which had caused that building or any part of the building not to be occupied for its intended purpose.

The December 2, 2011 report from Jeffery Lewis advises of his analysis on the issue of collapse. As indicated by Mr. Lewis in his letter:

"After reviewing the policy definition of collapse (attached) I have determined that no area at the complex had collapsed at the time of my investigation. Please note also that the Western Architectural report only references potential collapse conditions and provides no documentation whatsoever of any collapse."

Sequoia's investigation into this claim, including having the property inspected by a qualified structural engineer, has determined that the West Brook Apartments is not the subject of a collapse as that term is defined in the Sequoia policies. Under the circumstances of this claim, there is no Application of the additional Coverage of Collapse.

Hogan Decl., Ex. 2 at 11-12. Ultimately Sequoia denied Plaintiffs' claim "[b]ased on the information provided to Sequoia, as well as the request for additional information requested on October 26, 2011, Sequoia's inspection of the property and its reliance on the observations and conclusions of Mr. Lewis and West Coast Forensics." *Id.* at 12.

Hogan, however, advised Plaintiffs:

[I]f either you or your clients are aware of any facts which in your opinions is relevant to the coverage afforded under the Sequoia policies, we welcome those thoughts and will give serious consideration to any information provided. Should any information whatsoever be developed which bears in any way upon Sequoia's coverage in this matter, please bring it to our attention immediately.

*Id.* at 12-13.

Plaintiffs did not provide Sequoia with any further information related to their claim.

On May 15, 2012, Plaintiffs filed a Complaint in this Court against Sequoia and American Family Mutual Insurance Company alleging, among other things, that Sequoia breached its insurance-policy contracts with Plaintiffs when they denied Plaintiffs' September 2011 claim.

On August 28, 2012, Sequoia filed a Motion for Summary Judgment on the grounds that

- (1) Plaintiffs's claim is barred by the two-year contractual limitations provision because Plaintiffs filed this action on May 15, 2012, and the facts alleged in the Complaint and in the record establish the "hidden decay" that caused the damage was discovered and not repaired during SKL and PRP's renovations and repairs conducted in 2007 and 2008; therefore, all damages occurred well before the May 15,



2010, contractual two-year limitations date; and

- (2) Plaintiffs' alleged losses did not occur within the policy period because Plaintiffs fail to point to any alleged collapse from hidden decay that "commenced" during the policy period of August 15, 2008 to August 15, 2010; and, in fact, Plaintiffs' expert stated in his July 2011 report only that there was a "potential collapse condition" not that any part of the premises had collapsed and the record establishes the apartments were occupied as late as November 2, 2011; and

- (3) There has not been any "collapse" at the property within the meaning of the policy.

On November 15, 2012, Plaintiffs filed their Response to Sequoia's Motion in which Plaintiffs clarified that they seek coverage from Sequoia only for the alleged collapses in units 11 and 21 and only under the Additional Coverage Collapse section of the Sequoia policies. Plaintiffs allege the ceilings in units 11 and 21<sup>2</sup> "abruptly caved in on December 16, 2009 and January 1, 2010 respectively." According to Plaintiffs, therefore, collapses occurred within two years of "the tolling of

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<sup>2</sup> Theresa Peterson states in her Declaration that the ceilings in units 46 and 10 also suffered "cave in[s]" in 2011. Plaintiffs, however, advised the Court at oral argument that they do not rely on those events as a basis for their claim against Sequoia.

Plaintiffs' claims on November 15, 2011" and during the policy period.

Sequoia asserts in its Reply that in addition to its earlier bases for summary judgment, Plaintiffs do not have any coverage under Sequoia's policies because Plaintiffs failed to promptly notify Sequoia of the alleged collapses in units 11 and 21. Specifically, Sequoia points out that although Plaintiffs allege in their Response that the collapses occurred in December 2009 and January 2010, Plaintiffs did not allege the collapse of any particular units in their September 26, 2011, Notice of Claim letter nor are the alleged collapses noted in WA's July 2011 report on which Plaintiffs relied in their Notice of Claim and which merely noted "possible collapse conditions" rather than an actual collapse. In addition, Sequoia specifically relied on the lack of collapse in its December 2011 denial letter, and Plaintiffs never provided evidence or further information to Sequoia about the alleged collapses in units 11 and 21.

Sequoia pointed out in its Reply that Peterson testifies in her Declaration that she knew about the alleged collapses at the time they occurred, but Plaintiffs did not bring this information to Sequoia's attention until Plaintiffs filed a Response to Sequoia's Motion for Summary Judgment.

On December 14, 2012, the Court held a conference to address Sequoia's assertion that Plaintiffs relied on new evidence in

support of their claim and that Plaintiffs, therefore, had failed to give timely notice to Sequoia. At the hearing the Court stayed Sequoia's Motion to allow the parties to conduct additional discovery.

On February 15, 2013, the parties filed a Joint Statement of Agreed Facts related to Sequoia's Motion for Summary Judgment.

On February 26, 2013, the Court held another conference and directed the parties to file supplemental briefing on Sequoia's Motion for Summary Judgment.

On May 13, 2013, after additional discovery, Plaintiffs filed their Sur-Response to Sequoia's Motion in which Plaintiffs concede they did not inform Sequoia of the alleged collapses in units 11 and 21 until they filed their Response to Sequoia's Motion. Plaintiffs, however, assert Sequoia has not established any prejudice arose from Plaintiffs' failure to advise Sequoia of the collapses for more than two years, and, therefore, Sequoia is not entitled to summary judgment.

On May 20, 2013, Sequoia filed a Supplemental Reply in support of its Motion in which it continues to assert the failure of timely claims notice as a basis for summary judgment.

On June 7, 2013, the Court heard oral argument on Sequoia's Motion and Sequoia advised the Court that it no longer asserted Plaintiffs' claim is barred by the two-year, contractual-limitations provision. Sequoia advised the Court that, based on

additional discovery, it relies instead on its assertion that Plaintiffs have failed to establish there was any collapse in units 11 or 21 during the policy period and that Plaintiffs failed to give timely notice of the alleged collapses as bases for its Motion for Summary Judgment.

### STANDARDS

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9<sup>th</sup> Cir. 2011). See also Fed. R. Civ. P. 56(a). The moving party must show the absence of a dispute as to a material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. *Id.* "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9<sup>th</sup> Cir. 2010) (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d

1054, 1061 (9<sup>th</sup> Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9<sup>th</sup> Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004) (citation omitted). A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant of summary judgment." *Deering v. Lassen Cmty. Coll. Dist.*, No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at \*2 (E.D. Cal., Jan. 20, 2011) (citing *Harper v. Wallingford*, 877 F.2d 728, 731 (9<sup>th</sup> Cir. 1989)). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVR Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9<sup>th</sup> Cir. 2009) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

#### DISCUSSION

As noted, Sequoia advised the Court at oral argument that it

asserts two grounds for summary judgment: (1) Plaintiffs failed to establish a genuine dispute of material fact exists as to a collapse in unit 11 and/or 21 during the policy period and (2) Plaintiffs' notice to Sequoia about the alleged collapse was untimely.

#### **I. Policy language**

As noted, the Additional Coverage of Collapse section of Sequoia's policies defines a collapse as follows:

1. With respect to buildings:
  - a. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose;
  - b. A building or any part of a building that is in danger of falling down or caving is not considered to be in a state of collapse;
  - c. A part of a building that is standing is not considered to be in a state of collapse even if it is separated from another part of the building;
  - d. A building that is standing or any part of the building that is standing that is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinking or expansion.

Plaintiffs contend the phrase "abrupt falling down or caving in" is ambiguous and urge the Court to adopt the interpretation of that phrase set out in *Malbco Holdings, LLC v. AMCO Insurance Company*, 629 F. Supp. 2d 1185 (D. Or. 2009). In *Malbo* the insurance policy provision for collapse coverage defined collapse as, among other things "an abrupt falling down or caving in of a

building or any part of a building with the result that the building or part of a building cannot be occupied for its intended purpose." *Id.* at 1193. The court found that policy provision was ambiguous, and it ultimately interpreted the provision as follows:

[T]he occupancy restriction stands as a proxy for a substantial impairment of integrity by adding a life and/or safety element to the definition. If parts of a building abruptly fall or cave in to any degree such that they cannot be occupied for their intended purposes . . . then a collapse has occurred.

*Id.* at 1196.

Here Sequoia asserts the phrase "abrupt falling down or caving in" is not ambiguous. To establish that a collapse occurred, Sequoia contends a policyholder must show both that a building or any part of a building (1) suffered an abrupt falling down or caving in and (2) the building or a part thereof cannot be occupied as a result. Sequoia asserts the mere danger of falling down or caving in is insufficient to trigger coverage, and a falling down or caving in that does not render at least part of a building unoccupiable is also insufficient. Finally, even if the Court adopts Plaintiffs' proposed definition, Sequoia maintains Plaintiffs have not produced evidence sufficient to establish any abrupt cave-in occurred to a degree that rendered units 11 and 21 uninhabitable or usable for their intended purpose.

## II. Collapse

Plaintiffs rely on the Declarations of Theresa Peterson, Eric Hoff, and James Smagala to support their assertion that there were collapses in units 11 and 21 during the policy period. Defendant, however, contends those Declarations do not establish any genuine dispute of material fact that a collapse occurred.

### A. Peterson Declaration

Peterson testifies in her Declaration that she became a resident of Westbrook in March 2008 and has lived there since that time "with the exception of approximately a five-month period," the timing of which was neither set out in her Declaration nor identified at oral argument. Decl. of Theresa Peterson at ¶ 3. Peterson testifies she became the property manager at Westbrook in June 2010, which was several months after the second alleged cave-in occurred. *Id.* at ¶ 2.

Peterson testifies:

In my experience as property manager, I have received all maintenance requests, repair requests, and emergency repair requests at Westbrook. I received these types of requests at times on a daily basis and at other times on a weekly basis. As property manager, I have reviewed all maintenance and repair documentation for Westbrook on file, including all documents for the time period from 2008 until the present. I am very familiar with the maintenance and repair history of Westbrook from 2008 until the present.

*Id.* at 5.

As to the alleged collapses, Peterson testifies in



pertinent part:

Based upon my personal observations and investigations as *property manager*, many apartment units at Westbrook experienced a sudden and abrupt movement of several inches downward at ceilings and away from roof joists above. In other words, each of the ceilings experienced a cave in. The apartment units that have experienced a cave in include but are not limited to: (1) unit 11, top floor of Building 1 on December 16, 2009; (2) unit 21, top floor of Building 2 on January 1, 2010 and November 2010.

*Id.* at ¶ 6 (emphasis added).

As Sequoia points out, however, Peterson's Declaration does not establish how Peterson would have had any personal knowledge that the alleged cave-ins were abrupt. Specifically, Peterson testifies she did not become the property manager until June 2010, which is five to six months after the alleged cave-ins in units 11 and 21. Moreover, Peterson does not explain how she would have personal knowledge of abrupt collapses in the units when she was merely a resident of Westbrook. In addition, as noted, Peterson testifies she was not a resident of Westbrook for a five-month period. The evidence, however, does not identify the period when Peterson was not a resident and, therefore, lacked personal knowledge of events at Westbrook. Peterson also does not testify the alleged cave-ins rendered units 11 and 21 unoccupiable or to any degree uninhabitable or unuseable as rental properties. In fact, the July 2011 WA Report does not mention any units being uninhabitable or unoccupied for any

reason. Finally, Sequoia notes Smagala testified at deposition that he relied solely on the 2011 WA Report when he submitted Plaintiffs' claim to Sequoia and did not rely on any information from Peterson.

**B. Hoff Declaration**

Plaintiffs also rely on the Declaration of Eric Hoff, senior architect and president of WA, to support their allegation of collapses.

Although Hoff did not participate in WA's June 2011 investigation and review of Westbrook, he testifies he reviewed

photographs of construction defects and property damage taken by Western Architectural during its many investigations at Westbrook. I reviewed reports by Western Architectural documenting construction defects and property damage at Westbrook. I reviewed the declaration of Theresa Peterson, property manager for Westbrook, to obtain a history of the buildings.

Decl. of Eric Hoff at ¶ 4.

Hoff testifies with respect to the issue of collapse:

Based upon my review of photographic documentation, expert reports, maintenance reports, and the history of maintenance and repair issues documented in the Declaration of Theresa Peterson, I conclude that hidden decay caused abrupt movement and a cave in of ceilings at Westbrook at units . . . 11 [and] 21 . . . at the times noted in the Declaration of Theresa Peterson. At the time of each cave in, it was not safe for the occupants to inhabit the areas in each unit underneath the caved in ceiling. These areas could not be occupied for their intended uses while in a state of collapse.

*Id.* at ¶ 5.

Hoff, however, does not indicate in his Declaration the way in which the evidence before him establishes the alleged cave-ins occurred in December 2009 and January 2010 as opposed to occurring at some point between the end of the policy period (August 15, 2010) and the time of the inspection (June 2011).

Hoff also does not account for why WA's July 2011 Report did not mention any collapses or ceiling cave-ins in any Westbrook unit, but instead mentioned only "potential collapse conditions" even though the ceilings in units 11 and 21 purportedly caved in well before the June 2011 inspection by WA.

**C. Smagala Declaration**

James Smagala testifies in his Declaration that he "did not make a collapse claim at the time the ceilings caved in at units 11 and 21 because [he] was not aware that [Sequoia's] policies would cover such events." Decl. of James Smagala at ¶ 7. Smagala testifies he was not "aware of collapse conditions at Westbrook until after [WA] provided [him] with its initial investigation report in July 2011." *Id.*

Nevertheless, Smagala does not provide any explanation as to why he, as one of the owners of Westbrook, was not advised or informed about the alleged cave-ins of units 11 and 21 at the times they occurred, particularly in light of Peterson's testimony that she was aware of the cave-ins in December 2009 and January 2010.

Finally, Smagala does not testify units 11 and 21 were unoccupiable or unfit for their intended purpose after December 2009 and January 2010 as a result of the alleged cave-ins. In fact, the evidence establishes these units continued to be inhabited continuously until at least November 2011, which was four months after the WA Report.

**D. Declaration of Jeffrey Lewis**

Sequoia relies on the Declaration of Jeffrey Lewis, the structural engineer who conducted the onsite investigation of Westbrook as Sequoia's expert, to support its assertion that Plaintiffs have not established a genuine dispute of material fact exists as to the issue of collapse. Lewis testifies in pertinent part:

I have reviewed the Western Architectural report dated July 1, 2011 related to the Westbrook Apartments. The report references potential collapse conditions, but it does not provide any documentation whatsoever of any collapse of any of the buildings at the Westbrook Apartments as of the date of the report.

I also conducted an on-site investigation of the Westbrook Apartments on November 2, 2011. I personally observed all of the buildings during this investigation. At the time of this investigation, all of the units at the Westbrook Apartment complex were occupied with the exception of one or two units that were being cleaned and prepared for new tenants.

During my investigation on November 2, 2011, I looked for any evidence of collapse. None of the buildings had collapsed as of the date of my investigation. There was no evidence that any

part of any of the buildings had abruptly fallen down or caved in.

Lewis Decl. at ¶¶ 3-5.

**E. Summary**

Assuming without deciding that "collapse" should be defined as Plaintiffs argue, the Court concludes Plaintiffs, nevertheless, have not provided sufficient evidence from which a rational trier of fact could find that the ceilings collapsed in units 11 and 21. As noted, Plaintiffs rely on the testimony of Peterson, who was at best merely a tenant in another unit at the time of the alleged collapse and at worst was not even a resident at Westbrook at the time of the alleged collapses. In addition, the record reflects Plaintiffs' claims notice to Sequoia did not include any mention of collapses in any units, the WA report did not mention collapses in any units, West Coast's expert testified he did not see any collapses or cave-ins during his inspection, and the units in which the alleged cave-ins occurred continued to be occupied for years after the alleged collapses purportedly occurred and for at least four months after WA issued the July 2011 Report. Although the Court is required to view all evidence in the light most favorable to Plaintiffs as nonmovants, the Court may not engage in speculation.

On this record the Court concludes Plaintiffs have not provided sufficient evidence from which a rational trier of fact could find without speculation that ceiling collapses occurred in

units 11 and 21. Accordingly, there is not any legitimate jury issue on this question.

### **III. Failure to provide timely notice of collapses**

Even if Plaintiffs could establish a genuine dispute of material fact exists as to collapses in units 11 and 21, Sequoia also contends Plaintiffs failed to give Sequoia timely notice of the collapses as the policy requires, and, therefore, Plaintiffs are not entitled to coverage.

The Court notes it is undisputed that Plaintiffs did not claim the collapses in units 11 and 21 in their Notice of Claim/Proof of Loss and did not advise Sequoia of the collapses until Plaintiffs filed their Response to Sequoia's Motion for Summary Judgment on November 15, 2012, which was almost three years after the alleged collapses.

#### **A. Policy language**

With respect to notification for loss or damage, the policies provide in pertinent part:

##### **E. Duties in the Event of Loss or Damage**

- a. You must see that the following are done in the event of loss or damage to Covered Property:

\* \* \*

- (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a

description of how, when and where  
the loss or damage occurred.

**B. The law**

Oregon courts have held a policyholder bears the burden to establish conditions affording coverage, including the burden to show he provided timely notice of damage. See *Ass'n of Unit Owners of Nestani v. State Farm Fire & Cas. Co.*, 670 F. Supp. 2d 1159, 1161 (D. Or. 2009), *aff'd sub nom. Ass'n of Unit Owners of Nestani-A Grecian Villa v. State Farm Fire & Cas. In. Co.*, 434 F. App'x 579 (9<sup>th</sup> Cir 2011). The purpose of requiring the insured to give the insurer timely notice is to allow the insurer time to adequately investigate the potential claim and thus to protect itself and the insured. *Lusch v. Aetna Cas. & Sur. Co.*, 272 Or. 593, 597 (1975).

Under Oregon law an insurer may deny coverage on the basis of an insured's failure to give timely notice of the claim if the insurer satisfies a two-part inquiry regarding prejudice and reasonableness. *Gerke v. Travelers Cas. Ins. Co. of Am.*, 815 F. Supp. 2d 1190, 1201 (D. Or. 2011). The first inquiry is whether the insurer was prejudiced by the insured's conduct. *Id.* If the insured establishes prejudice, the second inquiry is whether the insured acted reasonably. *Id.*

**C. Prejudice**

Sequoia contends it was prejudiced by Plaintiffs'

failure to provide notice of the alleged collapses for nearly three years because Sequoia lost the opportunity to investigate the damage before any repair work was done on the units and lost the ability to determine the cause of the damage, whether it was a covered cause of damage, and to pursue any potential subrogation claims against the responsible party. Sequoia also asserts it lost the opportunity to assist in selecting repair contractors and to review repair bids.

Plaintiffs contend Sequoia has not shown it was prejudiced because Sequoia has not submitted "evidence to demonstrate why its expert could not determine the cause of collapses at Westbrook" under the existing circumstances. But this argument misses the point that it was nearly three years after the alleged collapses occurred when Plaintiff gave Sequoia notice, and, by that point in time, it was not possible for Sequoia to turn back the clock to have its expert examine the units to determine the alleged cause of the collapses at the time they occurred. This is especially true because, in the intervening years, many factors such as the nature of repairs and weather would make a reasonably accurate retroactive determination extremely difficult, if not impossible. Moreover, Plaintiffs do not even address Sequoia's assertion of prejudice based on the fact that by the time Plaintiffs ultimately reported the alleged collapse, so much time had passed that Sequoia had



effectively lost the ability to seek subrogation from any potentially responsible party for the alleged collapse.

The Court concludes this record establishes Sequoia suffered actual prejudice as a result of Plaintiffs' failure to give Sequoia timely notice of the alleged collapses and did not give actual notice until almost three years after they purportedly occurred.

**D. Reasonableness**

Sequoia also asserts Plaintiffs did not act reasonably when they failed to notify Sequoia of the alleged collapses until November 2012 because Peterson admits in her Declaration that she knew of the alleged collapses in units 11 and 21 at the time they allegedly occurred in December 2009 and January 2010. Sequoia asserts Peterson's knowledge is imputed to Plaintiffs as her employers because she was acting as their agent when she was the building manager. As noted, however, at the time of the collapse Peterson was not the manager of Westbrook and it is unclear whether she was even a resident. Nevertheless, Peterson became the manager of Westbrook in June 2010, and her knowledge of the alleged collapses can be imputed to Plaintiffs at least as of that date, which was still over a year before Plaintiffs' September 2011 Notice of Claim was submitted to Sequoia and over two years before November 2012 when Plaintiffs notified Sequoia of the alleged collapses.

Plaintiffs' response that their failure to give notice of the collapse until November 15, 2012, was reasonable because they did not discover the cause of the collapses until after WA conducted its investigation and issued its report in July 2011 is insufficient for two reasons. First, the policies require prompt notice of loss or damage rather than prompt notice after determining the cause of the damage or loss. Second, Plaintiffs still fail to establish why it was reasonable for them to fail to include notice of the alleged collapses in their September 2011 Notice of Claim and why Sequoia was not notified of the alleged collapse until Plaintiffs' filed their Response in November 2012, which was well over one year after Plaintiffs allegedly discovered the purported cause of the collapse.

On this record the Court concludes Sequoia has established it was prejudiced by Plaintiffs' failure to notify it of the alleged collapses until November 15, 2012. The Court also concludes Plaintiffs have not established their failure to notify Sequoia of the collapses until November 15, 2012, was reasonable. Accordingly, the Court grants Sequoia's Motion for Summary Judgment.

#### CONCLUSION

For these reasons, the Court **GRANTS** Defendant Sequoia Insurance Company's Motion (#12) for Summary Judgment and

**DISMISSES** Plaintiffs' claims against Sequoia.

IT IS SO ORDERED.

DATED this 21<sup>st</sup> day of August, 2013.

A handwritten signature in black ink, appearing to read "Anna J. Brown", is written over a horizontal line.

ANNA J. BROWN  
United States District Judge